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## Whose Political Constitution? Citizens and Referendums

By Stephen Tierney<sup>\*</sup>

### Abstract

*One notable feature about the debate between “liberal” and “political” constitutionalism has been its elite focus. The courts and the legislature are discussed in efforts to determine the appropriate role of each in processes of constitution-framing and changing. But this task is often set up implicitly as a zero-sum game. Although it might be claimed that citizens are tangentially relevant to this power struggle, a detailed account of whether citizens should, and how they might, play a direct role in constitutional authorship is seldom, if ever, placed on the table. This paper considers the elite orientation of this debate, questioning whether this is in normative terms acceptable, and in empirical terms credible, particularly as we consider how, over the past three decades, the referendum has emerged as an important vehicle for constitutional change in so many states.*

### A. Introduction

One notable feature about the debate between “liberal” and “political” constitutionalism has been its elite focus. The courts and the legislature are discussed in efforts to determine the appropriate role of each in processes of constitution framing and changing. But this task is often set up implicitly as a zero-sum game. The executive might make an appearance in the debate, but the citizen rarely does, except by way of lip-service. Although it might be claimed that citizens are tangentially relevant to this power struggle—as litigants or electors for example—a detailed account of whether citizens should, and how they might, play a direct role in constitutional authorship is seldom, if ever, addressed. In this paper, I will consider the elite orientation of this debate, questioning whether this is acceptable, in normative terms, and credible, in empirical terms, particularly as we consider how, over the past three decades, the referendum has emerged as an important vehicle for constitutional change in so many states.

The debate surrounding political constitutionalism has indeed, as the organizers suggest, been framed in reactive, if not defensive, terms. The debate has been seen as a reaction to legal constitutionalism, liberal legalism or, what it is often called in the United Kingdom

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(UK), common law constitutionalism.<sup>1</sup> The constitutional debate has undoubtedly been enriched by the liberal versus political constitutionalism debate, not least by revitalizing analytical theory in the study of public law.<sup>2</sup> This narrowing of the scope of political constitutionalism to be mainly reactive serves, somewhat ironically, both to over-emphasize the importance of courts to contemporary political and constitutional practice, and to narrow down the potentiality of the political constitution as a vehicle for political debate, and more importantly as a mode of revitalizing popular democracy.

As for the courts, constitutional lawyers can obsess about how liberal rights claims have superseded other constitutional priorities, and how courts have largely brought this change about (in doing so elevating their own constitutional position in relation to Parliament). In doing so, it is easy to miss the fact that court cases are still not, in the broader scheme of things, as significant a part of political or even constitutional decision-making as this level of focus would sometimes suggest.

Another consequence of this juridical orientation, and the narrowing down of the debate to a struggle about the relative appropriateness of Parliament and the courts to make constitutional decisions, is the insinuation, if not explicit conclusion, that constitutional change is, and should be, simply a war of the gods, fought out by representative (or not so representative) institutions, with the citizen playing the role of interested (or uninterested) onlooker.

Of course, it is understandable that the debate should be elite-focused. After all, the system of government within the UK—and other countries where the liberal versus political constitutionalism debates are most heated—is both a representative system and one that accords a prominent role to judicial review. But I would submit that the exclusivity of the elite focus is still surprising for at least two reasons. First, at the level of normative theory, if political constitutionalism is, as is often claimed, inspired by and situated within a broader republican tradition,<sup>3</sup> we might expect that political constitutionalists would remark more often about the degree of citizen engagement in constitutional processes.

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<sup>1</sup> There are, I think, interesting and important distinctions to be found in the English tradition of the common law, and its complex relationship with the democratic imperative that undergirds the legitimacy of the UK Parliament, that can distinguish it in positive ways from the didactic zeal of liberal legalism's methodological individualism, but space forbids such a discussion here. See Alison Young, *Sovereignty: Demise, Afterlife or Partial Resurrection?*, 9 INT'L J. CONST. L. 163 (2011).

<sup>2</sup> See Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 O.J.L.S. 183 (2005); see also MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* (2004); MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010). This body of work is exempt, of course, from the criticism of narrowness of scope which we find in some work on political constitutionalism.

<sup>3</sup> This is particularly so in the UK. See, e.g., ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005).

Second, it is also notable that the neglect of a civic republican focus within these debates occurs in the face of evidence of a growing disaffection among citizens with how elite politics works. More strikingly, it serves to overlook the fact that citizens are beginning to play a growing and direct role in constitution-making and constitution-changing processes across many states, not least through the proliferation of the referendum. The acceptance of representative democracy as a synonym for democracy itself is the complacent assumption upon which the political versus liberal constitutionalism debate takes place. Increasingly, however, the automatic default position of constitutional decision-making as operating solely through representative institutions is being questioned. My work in recent times has focused on the constitutional referendum. Building upon this work, in this paper I would like to reflect upon direct democracy as an aspect of political constitutionalism; focusing not only upon the horizontal relationship between elite institutions, but also the vertical constitutional relationships both among citizens themselves and between citizens and the system of representative democracy within which they live.

When we evaluate the growing phenomenon of citizen engagement in constitutional decision-making, we see that citizen engagement is in fact playing out against a dynamic of contemporary constitutionalism that is often overlooked in the political versus liberal constitutionalism debate, namely the malaise, or at least the perceived malaise, in how representative democracy in fact works today. And those who defend a political constitution, with Parliament at its core, have to confront the fact that the effectiveness of parliaments, and possibly even the legitimacy of parliaments, in making big decisions can be undermined by empirical evidence concerning the very efficacy of legislative, scrutiny and accountability, roles that legislatures are assumed to play.

Ironically, this is a point often picked up most coherently by liberal constitutionalists. One of the more persuasive arguments for a prominent and active constitutional role for courts—by which is often meant an assertive judicial role in controlling the executive—is that parliament is not up to the job. But political constitutionalists rarely focus on Parliament and its operability.<sup>4</sup> It is curious that among lawyers there is very little active research into how Parliament operates, and how the “representative political constitution” works in practice.

The referendum complicates both the political versus liberal constitutional debate and our understanding of the political constitution. In light of this observation, first, I will outline what I mean by a proliferation of the referendum by explaining how and where the referendum is being extended, and how this process can be said to be “constitutional.” Second, I will determine how this can be accounted for. Is it the case that the failings of

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<sup>4</sup> I make an exception here for Adam Tomkins and one or two others within the political constitutionalist tradition who do follow the logic of the argument that any defense of Parliament or parliaments hinges, at least to some extent, upon how well in practice they perform their constitutional functions. *See id.*

representative democracy in practice are in part fuelling this development? If so, does this phenomenon speak specifically to an ineffectiveness, democratic gap, or other deficiency in the “political” constitution? And third, given that referendums are reviving or proliferating particularly in the area of constitutional change, what is it about processes of constitutional change that lend themselves to the application of the referendum, and can this development be accommodated within a political conception of the constitution that is so often predicated upon the implicit assumption of an exclusively representative model of decision-making?

#### **B. The Proliferation of the Referendum in Processes of Constitutional Change**

Over the past few decades we have seen a proliferation in the use of the referendum in processes of major constitutional change across the globe. In the table below I set out a summary of how referendum use has grown in four main areas of constitutional practice. It is notable that many of these issues are of the most fundamental significance.

<b>4 types of referendum in the “new wave”</b>	<b>Examples</b>
Founding of new states	Post- USSR and SFRY Eritrea (1993), East Timor (1999), Montenegro (2006), South Sudan (2011)
Creation and amendment of new constitutions	Post- USSR and SFRY Iraq – ratification of the Constitution of 2005 Egypt – constitutional reforms 2011
Sub-state autonomy	Spain United Kingdom
European Union: accession and integration treaty-making processes	2004: Malta; Slovenia; Hungary; Lithuania; Slovakia; Poland; Czech Republic; Estonia; Latvia 2012: Croatia

First, in the founding of new states: The referendum was widely used in the early nineties in the break-up of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY) and its use is now the default mechanism for the emergence of most new states as exemplified by Eritrea (1993), East Timor (1999), Montenegro (2006) and South Sudan (2011). Kosovo is a possible exception, but even here we saw unofficial referendums in the 1990s much like those in some other parts of the former Yugoslavia. Second, referendums were once very rarely used in the creation or amendment of constitutions. But again, throughout Eastern Europe and more recently in Iraq and Egypt

we see the referendum emerge both in application—in the founding of new constitutions—and as a promise within the text of these constitutions in anticipation of future amendment procedures. Third, a sub-set of number two, referendums have been used to establish complex new models of sub-state autonomy as we have seen in the UK and Spain. Fourth, we have also seen a major proliferation in referendum use in the accession to and the transfer of sovereign powers from European states to the European Union (EU). As an example, of the first fifteen countries to join the EU, only Ireland and Denmark held referendums to ratify the decision. Of the ten countries that joined the EU in 2004, only Cyprus did not hold a referendum. We saw the trend continue in January 2012 when the Croatians voted in a referendum for accession in 2013.

The UK is a good example of how the referendum has evolved from a highly exotic constitutional option to one that is increasingly normalized within constitutional practice, as the next table demonstrates.

*I. Referendums in the United Kingdom*

Place	Date	Issue	Turnout	Result
Northern Ireland	8 March 1973	Remain part of the UK	58.7	Approved: 98.9
Northern Ireland	22 May 1998	Belfast Agreement	81.1	Approved: 71.1
Scotland	1 March 1979	Creation of a Scottish Assembly	33	Approved: 52 (did not meet threshold)
Wales	1 March 1979	Creation of a Welsh Assembly	58.8	Not approved: 79.7
Scotland	11 September 1997	1. Creation of a Scottish Parliament. 2. Devolution of limited tax-varying powers	60.4	1. Approved: 74.3 2. Approved: 63.5
Wales	18 September 1997	Creation of a National Assembly	50.1	Approved: 50.3
England (London)	7 May 1998	GLA and Mayor	34.6	Approved: 72
England (North East)	4 November 2004	North East England regional assembly	47.8	Not approved: 78
Wales	3 March 2011	Devolution of further powers to the National Assembly	35.4	Approved: 63.5
Scotland	Autumn 2014?	Independence		
United Kingdom	5 June 1975	Continued EC membership	64.5	Approved: 67.2
United Kingdom	5 May 2011	Electoral System: Alternative Vote	42.2	Not approved: 67.9

Given that these processes involve the people directly in such fundamental decisions, it seems increasingly important to fit this fact, and the use of referendums specifically, within theories of political constitutionalism. As suggested in the introduction, it is curious that the political constitutionalist model, insofar as it reflects republican traditions, tends to focus upon what we might call elite republican theory.<sup>5</sup> In considering the revival of the referendum and other avenues of renewed citizen engagement in politics, however, which often occur not only alongside, but in some ways largely detached from, mainstream representative models of democracy, we need to conceptualize constitutional events over the past two decades. The post-1989 world is one in which citizen-centered, or *civic* republican authorship in state-creation and constitution-framing has been, and in certain contexts, such as EU enlargement and integration, continues to be, a significant factor.

In light of the empirical evidence for its growing prominence, is it surprising how popular engagement in general constitutional processes, and particularly the referendum, has been so neglected in debates about political constitutionalism. Especially because of the challenge popular engagement in general constitutional processes presents for the representative model of democracy upon which so many of the tenets of political constitutionalism are implicitly built. The main challenge that political constitutionalists throw at liberal legalism is its lack of democratic legitimacy. But, in some sense, it would seem to be the very democratic legitimacy of representative models of political constitutionalism that is being called into question by the rise of direct democracy.

## *II. Direct Democracy in an Age of Instability*

How then do we explain the proliferation of the referendum? And can we set it against wider arguments concerning the malaise of contemporary constitutionalism? The reasons as to why the referendum has emerged as such a key player in contemporary constitutional practice are, of course, many and complex, so much so that lawyers are perhaps not best placed to assess them. But the “why” question invites speculation, particularly because some of the trends that intuitively seem to have influenced this phenomenon also speak to the health, or indeed infirmity, of contemporary democracy.

It is notable that there are three ways in which the proliferation of constitutional referendums (across the four constitutional processes I have mentioned) are occurring. First, the increased application of ad hoc or discretionary referendums in states where the constitution does not require their use. An example is the United Kingdom, which hosted two referendums in 2011. One was a state-wide poll on the voting system. The other, in

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<sup>5</sup> For a focus of a number of contemporary constitutional theorists (e.g. Tomkins, Bellamy), see PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (2007); see also Hoi Kong, *Towards a Civic Republican Theory of Canadian Constitutional Law*, 15 REV. CONST. STUD. 249 (2011).

Wales, involved the devolution of further powers to the National Assembly. The United Kingdom has now committed to the possibility of further referendum use in both the Northern Ireland Act 1998<sup>6</sup> and the European Union Act 2011.<sup>7</sup> Another example is the Netherlands, which in 2005 conducted its first ever referendum on the draft European Union Constitutional Treaty. Second, is the growth in the number of constitutions that now mandate referendum use, a trend we find in the new orders emerging in Central and Eastern Europe after 1989. And third, the promotion of the referendum by international institutions as they intervene in post-conflict processes around the globe.

In some respects, the rise of the referendum is clearly a product of circumstances. For example, one key driver was the break-up of multinational states coinciding with the collapse of communism in Europe. In this context, the referendum offered dissenting political actors a vehicle for popular revolt, legitimizing and, in due course, foreclosing acts of constitutional rupture through direct popular intervention. A common usage for the referendum over the past quarter of a century, therefore, has been in the creation of new states and their subsequent constitutions, as well as the move to liberal democracy by many of the former USSR's satellite states. From 1989 to 1993 there were at least sixteen referendums in Yugoslavia.<sup>8</sup> An additional six referendums were held in Central and Eastern Europe and twenty-five in the territory of the former Soviet Union.<sup>9</sup> Of these thirty-one, twelve were on sovereignty or independence, seven on new constitutions or forms of government, and twelve dealt with policy matters.<sup>10</sup>

Another originator of constitutional referendums has been European integration. The period since the early 1990s has also been one of fairly intense treaty-making within the EC/EU, especially since the constitutions of some member states—most notably Denmark and Ireland—in effect mandate referendums ahead of the ratification of such treaties. In this context, again, referendums emerge simply as the indirect result of other political processes.

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<sup>6</sup> Northern Ireland Act 1998, 1998, c. 47, § 1(1) (U.K.) ("It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purpose of this section . . .").

<sup>7</sup> European Union Act 2011, 2011, c. 12, § 2 (U.K.) ("A treaty which amends or replaces TEU or TFEU is not to be ratified unless . . . the referendum condition or the exemption condition is met.").

<sup>8</sup> It is difficult to be too precise. As I have noted, the referendum was used as a political tool by rival political actors at this time and the use of unofficial polls by small regions proliferated.

<sup>9</sup> See Henry E. Brady & Cynthia S. Kaplan, *Eastern Europe and the Former Soviet Union, in* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 174, 180 (David Butler & Austin Ranney eds., 1994).

<sup>10</sup> *Id.*



But these three factors do not tell the whole story. An increasing number of states, including those emerging by way of referendum in Central and Eastern Europe, have seen fit to include the referendum in new constitutions as a key instrument of constitutional amendment. In other words, the referendum was not only instrumentally useful in the overthrow of communism or the securing of independent statehood, it retained sufficient salience to be included in the post-revolutionary constitution. There are, therefore, several features which suggest that the growth of the constitutional referendum is not simply a short-lived consequence of a particularly intense period of "sovereignty politics." First, is the very fact that they came to be seen as an essential part in almost every move to new statehood by a sub-state people (one notable exception is the dissolution of Czechoslovakia when the parties could not agree on a referendum question).<sup>11</sup> This can be contrasted with earlier periods of state-making after both World Wars I and II when the referendum was rarely used, even in the face of widespread empire collapse. This suggests that by the late 20th century, for the first time the referendum had become, for many, an automatic part of constituent constitutionalism and even of the constitutional amendment process. Second, another feature of the referendum revival is the influence of international actors in these processes. We see this in the international community's norm-creation processes, particularly in Europe,<sup>12</sup> and in intervention in the cases mentioned above. A third element is the application of the referendum by countries with little or no constitutional tradition of using the referendum, but that now seem increasingly inclined to turn to the referendum at important constitutional moments. The political capital to be made from demanding a referendum and the danger in denying one suggests that this development is not only a consequence of political maneuvering, but of the changing expectations of citizens; Jacques Chirac's concession of a referendum on the draft Constitutional Treaty, ironically following Tony Blair's earlier promise, is a notable example.

It seems, therefore, that while remaining mindful of the historical contingency of much recent referendum use, we also need to locate the rise of the referendum within broader changes in contemporary democratic practice and critique. One trend that has been identified is the increasing sophistication of contemporary electorates through better education and access to information. Dalton has called this development "cognitive mobilization" and argues that it is leading to stronger popular pressure for a greater say in governmental decision making.<sup>13</sup>

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<sup>11</sup> See Stephen White & Ronald J. Hill, *Russia, the Former Soviet Union and Eastern Europe: The Referendum as a Flexible Political Instrument*, in *THE REFERENDUM EXPERIENCE IN EUROPE* 153, 157–60 (Michael Gallagher & Pier Vincenzo Uleri eds., 1996).

<sup>12</sup> European Commission for Democracy Through Law, *Code of Good Practice on Referendums*, Study No. 371/2006 (Jan. 20, 2009), available at <http://www.venice.coe.int/webforms/documents/CDL-AD%282007%29008rev.aspx>.

<sup>13</sup> See RUSSELL J. DALTON, *CITIZEN POLITICS IN WESTERN DEMOCRACIES: PUBLIC OPINION AND POLITICAL PARTIES IN THE UNITED STATES, UNITED KINGDOM, GERMANY, AND FRANCE* (2d ed. 1996).

If public demand is a factor, another reason for referendum proliferation may be increasing disaffection among voters towards conventional representative politics. Political scientists have documented evidence of a loss of public trust and efficacy within democracies.<sup>14</sup> Mendelsohn and Parkin identify both cognitive mobilization and heightened skepticism as important factors behind the rise of “referendum democracy.”<sup>15</sup> In their analysis: “[i]t is . . . likely . . . that a shift in political attitudes has taken place, the effect of which has been to make citizens either more confident in their ability to make key policy decisions or less confident in the ability of their elected representatives to do so.”<sup>16</sup>

Various trends seem to have heightened citizen dissatisfaction with representative government and these are of course familiar: The elite monopolization of policy-making; the ever more efficient communications machinery of government that seems to be increasingly manipulative in “spinning” stories; the increased influence of big business in the political process; the hiving-off of government functions to technocratic and semi-private agencies, with concomitant breaks in the chain of accountability; the declining respect for the standards of behavior of elected representatives; and the incongruous results within certain electoral systems which do not seem to reflect voter preferences. The parallel decline in levels of party membership and electoral turnout is therefore no coincidence.

Globalization has also nourished citizen disaffection with mainstream politics as people see power move away from the state not just to supranational “constitutional” sites but also to private transnational corporations and structures. It seems, therefore, that the revitalization of direct democracy is in part a reaction not just to the declining standards of representative democracy, but also to its emasculation in a world where its capacity for power is diminishing. It is interesting that the ad hoc referendum has emerged particularly as a feature of the recent EU constitution-making process, but France and the Netherlands turned to direct democracy for the draft EU Constitutional Treaty, even though the decision to hold a referendum was within the discretion of the French president and not mandated by the constitution. The acts of rebellion we saw in the Dutch and French processes and in Ireland over the subsequent Lisbon Treaty also hint at a growing popular disquiet with the trajectory or at least the process of integration.

Furthermore, it seems that technology has been, and is likely increasingly to be, a factor in demands for more direct democracy. Anthony Giddens has observed that “[t]he downward

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<sup>14</sup> E.g., NEIL NEVITTE, *THE DECLINE OF DEFERENCE: CANADIAN VALUE CHANGE IN CROSS NATIONAL PERSPECTIVE* (1996).

<sup>15</sup> See Matthew Mendelsohn & Andrew Parkin, *Introduction*, in *REFERENDUM DEMOCRACY: CITIZENS, ELITES, AND DELIBERATION IN REFERENDUM CAMPAIGNS 1* (Matthew Mendelsohn & Andrew Parkin eds., 2001).

<sup>16</sup> *Id.* at 6.

pressure of globalization introduces not only the possibility, but also the necessity of forms of democracy other than the orthodox voting process.”<sup>17</sup> In his view, referendums are one of the “experiments with democracy” resulting from this by which government and citizens can “re-establish more direct contact” with one another.<sup>18</sup> Certainly, with people taking part more and more in informal online polls, engaging more directly in politics, for example through social networking, blogging and micro-blogging, the notion that their only engagement in constitutional politics should come indirectly through periodic representative elections could appear increasingly incongruous. And it seems that the revival of the referendum is itself part of a broader confluence of demand and opportunity, leading to experiments that engage citizens through innovative constitutional processes such as citizens juries and citizens assemblies. The proliferation of the referendum, I would submit, should be seen in this light; that is, not necessarily as a short-term phenomenon, but potentially as but one aspect of a broader and potentially long-term move towards more direct forms of citizen engagement in constitutional matters, particularly as the technological facility to provide such engagement develops.

### C. Conclusion: Referendums and the Political Constitution

Finally, it is useful to reflect upon the referendum’s implications for political constitutionalism, particularly if the referendum proves to be not only a fixed feature of constitutional democracy, but a growing one. One intuitive way to accommodate this development is to envisage the referendum as a supplement to the role of Parliament which remains the main focus for democratic constitution-making or change within the political constitution. This is very much how the referendum was presented in a House of Lords Constitution Committee Inquiry report into the Referendum within the UK Constitution in 2010.<sup>19</sup> There, the referendum was treated with considerable skepticism, but its growing salience seemed to lead the Committee to conclude that it was better to make a virtue out of a necessity by thinking about which matters lend themselves most appropriately to the use of the referendum and how to best construct a fair referendum process.

But at the same time, we should be alert to the fact that the referendum can carry very substantial risks to democratic constitutionalism itself. From the perspective of political constitutionalism, perhaps the most obvious risk is that of elite control, particularly the claim that the referendum is simply a mask for executive hegemony. By this argument, the

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<sup>17</sup> ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 75 (1998).

<sup>18</sup> See *id.*

<sup>19</sup> SELECT COMMITTEE ON THE CONSTITUTION, *REFERENDUMS IN THE UNITED KINGDOM, 2009-10*, H.L. 99 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf>.

referendum is a device that can be proposed by governments and controlled by governments in a way that bypasses both the courts and the legislature in order to secure the executive agenda. The referendum is attractive to executive bodies particularly because they are able to achieve their political goals by manipulating an unreflective and ill-informed electorate into voting for a particular proposition. In this context, the referendum threatens the legislature's role within the political constitution by indirectly bolstering the executive. Referendums deployed, for example, by President De Gaulle in the 1950s and 1960s are frequently cited in this regard.<sup>20</sup>

There is no doubt that there are very serious process problems in much of the referendum experience we are seeing around the world.<sup>21</sup> It is also the case that referendums are increasingly influenced by external and international actors, particularly referendums on state-making—as we have seen in Eritrea, East Timor, Montenegro, and South Sudan.

The referendum is a growing reality, and the option of simply dismissing it as undemocratic, although perhaps comforting, does not fulfill the important task to which the constitutional theorist must commit, which is to analyze the constitutional landscape as it is, not as we would like it to be. And the role for normative constitutional theory is surely, from constitution to constitution, to improve the workings of existing constitutional models, rather than simply to wish them away. In my broader work, I have confronted the elite control criticism by suggesting that it is at heart a criticism of the practice rather than the principle of referendum use. As such, I have asked if it might be overcome by effective process design.<sup>22</sup>

It is also the case that civic republicans—committed to the goal of an active citizenry—may well conclude that when matters involving the very framing of a democratic system of government are at stake, the direct engagement of the people either supplementing, or even replacing, representative institutions is appropriate. This builds upon work within the republican revival of the 1980s that focuses upon constitutional politics as distinct from ordinary politics and in doing so stresses the desirability of engaging more overtly with ordinary citizens, particularly at the constitutional level per Ackerman's distinction

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<sup>20</sup> See generally ANTHONY HARTLEY, *GAULLISM: THE RISE AND FALL OF A POLITICAL MOVEMENT* (1972); SERGE BERSTEIN, *THE REPUBLIC OF DE GAULLE 1958-1969* 8–11 (Peter Morris trans., 1993); Guy Carcassone, *France (1958): The Fifth Republic After Thirty Years*, in *CONSTITUTIONS IN DEMOCRATIC POLITICS* 241 (Vernon Bogdanor ed., 1988).

<sup>21</sup> For example, the farcical referendum held in Syria in 2012. See Khaled Yacoub Oweis, *Syria Approves New Constitution Amid Bloodshed*, REUTERS, Feb. 27, 2012, <http://www.reuters.com/article/2012/02/27/us-syria-idUSL5E8DB0BH20120227> (noting that, even though “Syrian artillery pounded rebel-held areas[,] . . . President Bashar al-Assad's government announced that voters had overwhelmingly approved a new constitution in a referendum derided as a sham by his critics at home and abroad”).

<sup>22</sup> See STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* (2012).

between “the will of We the People” and “the acts of We the Politicians.”<sup>23</sup> It may well be that the distinction between ordinary and constitutional politics is also not accorded as much attention within mainstream republican thought as it might be. Again, this may be a reason for the republicans’ neglect of the need to engage the public, particularly at moments of constitutional decision-making. A second argument, which flows from the first, is that in such decisions, the very identity of the *demos* can be implicated; particularly when they involve truly fundamental or constitutive constitutional issues, such as the founding of a new state, the transformation of the constitution or even the transfer of sovereign powers beyond the state. This means that a constitution can come to embody the political selfhood of the people. In this sense, the “popular” constitution extends beyond the functional purpose of framing a system of government; it can take on a symbolic representational role, encapsulating the very identity of the people, while also embodying emblematically its collective settled will.<sup>24</sup> In turn, individuals come reflexively to identify with one another through their shared commitment to this constitution. It is, therefore, also in this context of the polity-building or nation-building potential of constitutional law-making that we must address constitutional referendums. When referendums are used to make or re-create constitutions they can themselves take on a vital nation-building role. The task then becomes one of framing the referendum process in such a way that it facilitates the active and deliberative engagement of citizens, so far as possible.<sup>25</sup> In light of these high stakes, from a civic republican perspective, there again appears to be a strong *prima facie* case for direct popular engagement.

Therefore, if the democratic failings of referendum practice can be overcome, it may well be that these exercises, in generating the direct engagement of the citizen in moments of constitutional authorship, have the potential to help reinvigorate democracy itself. In any event, this is a debate that surely needs to take place within the political constitutionalist tradition, and yet it is one that is seemingly neglected. It may well be that this oversight is another unfortunate symptom of the fixation courts and judges have with political constitutionalism.

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<sup>23</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

<sup>24</sup> Rosenfeld discusses how modernist constitutionalism has played the role of constructing a form of collective self that builds upon but is, in its unitary and unifying functions, also different from diverse pre-constitutional cultural and ethnic attachments. See MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* (2010).

<sup>25</sup> See TIERNEY, *supra* note 22, at 285–99.